Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ASHBY BEVERLEY,

Petitioner,

v.

YOSHIO OTO, Executor of the Estate of Noboru Oto,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court may provide an exception to the due diligence requirement of Rule 60(b)(2) when the newly discovered evidence is practically conclusive or to prevent a manifest miscarriage of justice?

PARTIES TO THE PROCEEDING

Petitioner

Ashby Beverley is an individual and has no corporate affiliations.

Respondent

Yoshio Oto, Executor of the Estate of Noboru Oto, is an individual and has no corporate affiliations.

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The opinion of the court of appeals (App. A) is reported at 224 F.3d 601. The opinions of the district court (App. B, C, D) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 11, 2000 (App. A) and denied appellant's petition for rehearing on September 21, 2000 (App. E). This petition for Writ of Certiorari is filed within 90 days of denial of the Petition for Rehearing. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 60(b)(2) of the Federal Rules of Civil Procedure provides, in relevant part, that relief from a final judgment or order may be granted if "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)" is presented.

STATEMENT OF THE CASE

The facts of this case are complicated and in dispute. In 1989, Noburo Oto ("Oto") purchased a premium whole life insurance policy with a face value of $250,000.00 on the life of his then 24-year-old daughter, Suzanne Oto. On February 19, 1997, a change of beneficiary form ("form") was executed bearing Oto's signature witnessed by Suzanne. This form, sent to Met Life, changed ownership of the policy from Oto to Suzanne and named Ashby Beverley ("Beverley"), Suzanne's then boyfriend, as the beneficiary of the policy. Oto then submitted an application to the Illinois Department of Public Aid on May 8, 1997, wherein he stated that he had no money to pay medical bills and that he did not own any life insurance policies. Suzanne and Beverley were married on February 10, 1998, and Beverley was her sole caretaker from the time she was diagnosed with breast cancer in June, 1997 until her death on March 22, 1998.

After Suzanne's death, Oto denied signing the form and brought this action against Met Life seeking a declaration that his signature on the form was not genuine and for recovery of the proceeds of the policy. Met Life brought a third party action against Beverley and deposited the proceeds with the court, leaving Oto and Beverley to fight over the issue of whether the signature on the form was that of Oto.

Contrary to the facts set out in the Seventh's Circuit's opinion, Oto was not litigating this case at the same time he was in state court with Beverley over a separate matter. The state court matter was decided on August 10, 1998, this action was initiated by Oto on September 15, 1998. On July 20, 1998, Oto testified during his deposition in the previous case that he did not remember whether he "ever signed any papers for Metropolitan Life with respect to [his] daughter's life

insurance policy" and that he did not have any "assets". Oto also testified that he had no documents with his signature, financial or otherwise, in his possession at the nursing home where he resided. Subsequent to the filing of this case and before Beverley was made a party to this case, Oto died and his brother, Yoshio Oto ("Yoshio"), was substituted as the plaintiff.

Prior to Beverley even being named a defendant in this case, a status hearing was held on November 19, 1998 where the district court ordered the parties comply with FRCP 26(a)(1) by February 19, 1999 and that discovery cut-off was set for March 19, 1999. Beverley's attorney had no knowledge of the case nor the status hearing and was not present at this hearing. On November 30, 1998, Met Life filed their answer and third-party complaint against Beverley. It was not until December 23, 1998 that Beverley filed his appearance, answer, and jury demand in this case. On March 18, 1999 the district court granted Beverley's motion for additional time to complete discovery, without hearing, moving the discovery cut-off date only 30 days, to April 19, 1999, final extension.

Beverley attempted to discover individuals likely to have information regarding the disputed facts in this case but Plaintiff offered only Yoshio. Beverley also requested documents relevant to the disputed facts and the Plaintiff only revealed Oto's deposition transcript from the previous case and nothing which revealed others familiar with Oto's signature. During discovery, Oto was dead and had no surviving relatives in the Chicago area and his only other known relative, Yoshio, lived in Oakland, California. Yoshio testified that he had none of Oto's documents in his possession, other than a copy of his will, and that the only reason Oto objected to the proceeds going to Beverley was

because he (Oto) needed the money more. Beverley never lived with Oto, never possessed any of his documents, and did not know anyone other than Suzanne who was familiar with his signature.

Yoshio moved for summary judgment on the basis of Oto's affidavit that he did not sign the form, Oto's testimony from the previous case that he did not sign the form, and on the basis of his expert's testimony. Beverley attacked the motion relying in part on the form itself, which contained the signature of Oto witnessed by Suzanne, and on the basis of Oto's prior claim that he owned no assets. On May 11, 1999, the district court granted the motion for summary judgment in favor of the Estate of Oto ruling that Beverley failed to present evidence creating a genuine issue of material fact as to the authenticity of Oto's signature on the form. (App. D).

Shortly after the district court's judgment and less than one month after discovery closed, Beverley's attorney learned for the first time of the existence of a witness named Juan Pagan ("Pagan"), who had worked for Oto from 1996 to 1997 doing odd jobs at his home. Pagan, while working for Oto, saw him sign his name numerous times on various documents, was personally familiar with Oto's signature, and stated in an affidavit that the signature on the form at issue was indeed Oto's signature.

Beverley filed a motion pursuant to Rule 60(b), alleging in part, that on the basis of the newly discovered evidence of Juan Pagan, that the previous order be vacated. Beverley's attorney asserted that he was unaware of Juan Pagan's existence during discovery and could not have with reasonable diligence discovered and produced him to give evidence until after the district court's ruling. The district court, without hearing, denied Beverley's motion stating that

"Beverley failed to sufficiently explain why with reasonable diligence he could not have discovered and disclosed Pagan as a witness and that Beverley did not establish that he made any effort during discovery to locate former employees or others purportedly familiar with Oto's signature." (App. B).

Beverley filed a subsequent motion, again asserting that the only inference to be drawn from Beverley's attorney's affidavit was that he did exercise due diligence and did attempt to locate individuals familiar with Oto's signature during discovery but was unable to do so because of the circumstances in this case. Beverley reminded the district court that the only two witnesses with information regarding Oto's signature, Oto and Suzanne, were not available during discovery. Likewise, neither Yoshio nor Beverley, possessed any knowledge of individuals familiar with Oto's signature, or any documents that belonged to Oto. The district court denied Beverley's motion, again without hearing, and stated that Beverley failed to conduct discovery with reasonable diligence, and that the record demonstrates that Beverley was not diligent in discovery (App. B), which Beverley still refutes.

Beverley appealed the district court's judgment claiming, in relevant part, that pursuant to Rule 60(b), Pagan could not have been found with due diligence and alternatively, that because Pagan's evidence was practically conclusive, due diligence was not required under the Farrell exception to Rule 60(b)(2). The appellate court denied Beverley's appeal stating that Beverley did not exercise due diligence in discovering Pagan because he could have asked Oto for the names of former employees during Oto's deposition, or he could have subpoenaed Oto's business records. (App. A, pages 11a and 12a). The appellate court did not consider Beverley's argument that an exception to the

due diligence requirement of Rule 60(b) should have been made in this case. (App. A).

Beverley filed a petition for rehearing on the grounds that the appellate court overlooked and misapprehended critical facts and law when considering the diligent discovery of Pagan and the other evidence put forth supporting Beverley's contention that Oto did sign the form. Beverley reminded the appellate court that Pagan's existence could not have been discovered through a subpoena of Oto's business records, since the business was closed in 1993 and since Pagan was not an employee of that business. Likewise, Beverley reminded the appellate court that Beverley's attorney could not be expected to anticipate during the deposition of Oto in the prior case the issues that he would be presented with six months later in this case. Lastly, Beverley reiterated that the court overlooked law creating an exception to the due diligence requirement of Rule 60(b)(2) where the evidence is practically conclusive. The appellate court denied Beverley's petition for rehearing on September 21, 2000 without comment. (App. E).

Beverley now files a Petition for a Writ of Certiorari with this Court documenting the substantial split among the circuits on whether or not to provide an exception to the due diligence requirement of Rule 60(b)(2).

REASONS FOR GRANTING THE PETITION

As the Seventh Circuit, itself, recognizes, there is a substantial split in the circuits as to whether there are exceptions to the due diligence requirement of Rule 60(b)(2). This split in the circuits has created conflicting decisions and the need for guidance from this Court is essential to ensure that justice is uniformly administered. Also, the decision

below is erroneous and must be reversed to prevent a manifest miscarriage of justice.

I. The Seventh Circuit's Interpretation of FRCP 60(b)(2) Conflicts with Other Circuit's Interpretation and Aggravates the Existing Split of Authority in the Circuits.

The Seventh Circuit failed to consider nearly 50 years of federal court decisions establishing an exception to the due diligence requirement of Rule 60(b)(2). Indeed, the Second, Fifth, and Eleventh Circuits have established that a new trial may be appropriate to prevent a manifest miscarriage of justice, although due diligence is lacking, when the evidence is practically conclusive. However, the Seventh Circuit has not adopted such an exception to the due diligence requirement of Rule 60(b)(2) and parties are left without recourse when practically conclusive evidence shows that the judgment was erroneous. As a result of this substantial split in the circuits, an unacceptable and unjust disparity exists in the administration of justice from one region of the country to the next.

A. The Exception to the Due Diligence Requirement of 60(b)(2)

An exception to the due diligence requirement of Rule 60(b)(2) was first established in the Fifth Circuit in 1955 in *Ferrell v. Trailmobile, Inc.*, 223 F.2d 697 (5th Cir. 1955). In *Ferrell*, the district court granted Trailmobile's motion to dismiss on the basis that Ferrell failed to pay one of eighteen installments for the purchase of a truck trailer. After judgment was rendered against him, Ferrell discovered copies of three money orders totaling the amount owed on the installment and presented an affidavit of the bank auditor

where the money orders were deposited. With this newly discovered evidence, Ferrell sought relief from the judgment under Rule 60(b)(2). The district court denied his motion for relief under 60(b)(2). However, upon reviewing the district court's decision to deny Ferrell relief, the appellant court reversed the district courts judgment and reasoned that:

> "[i]f, in fact, practically conclusive evidence shows that the appellant had actually paid all eighteen installments for the purchase of the trailer, it is obvious that the judgment should be set aside to prevent a manifest miscarriage of justice. In such a case, the ends of justice may require the granting of a new trial even though proper diligence was not used to secure such evidence."
>
> *Id.* at 698.

This exception to the due diligence requirement of 60(b)(2) has become known as the Ferrell Rule.

In the wake of the landmark 1955 decision, the Fifth Circuit upheld and applied the Ferrell Rule where the movant belatedly discovered evidence that established, virtually conclusively, that an erroneous judgment had been entered. *W.S. Dickey Clay Manufacturing v. Corder*, 310 F.2d 764 (5th Cir. 1962); *Serio v. Badger Mutual Insurance Company*, 266 F.2d 418 (5th Cir. 1959); *Skidmore v. Syntex Laboratories, Inc.*, 529 F.2d 1244 (5th Cir. 1976).

The Fifth Circuit continues to uphold the exception to the due diligence requirement to 60(b)(2). In 1980, *Johnson Waste Materials v. Marshall*, 611 F.2d 593 (5th Cir. 1980) the court held that a lack of due diligence in securing records

cannot preclude reformation of the judgment given the well-nigh conclusive evidence of those records. Likewise in, *Chilson v. Metropolitan Transit Authority, et al.*, 796 F.2d 69 (5th Cir.1986) the court stated that the courts have clearly established that a new trial may be granted under the rule if the newly discovered evidence is material and that it would probably produce a different result. District courts within the Fifth Circuit have also recognized that a judgment may be reopened where newly discovered evidence is practically conclusive. *Wilcox v. Petroleum Helicopters Inc.*, 145 F.R.D. 406 (S.D.Tex. 1993).

Other circuits have joined the Fifth Circuit in carving out an exception to the due diligence requirement of Rule 60(b)(2). The Eleventh Circuit recognizes that a "failure to exercise due diligence has not barred opening the judgment and taking new evidence when the newly discovered evidence is practically conclusive." *Shook & Fletcher Insulation Company v. Central Rigging & Contracting Corporation*, 684 F.2d 1383 (11th Cir. 1982). Likewise, the Second Circuit embraced a due diligence exception stating that "it is true that even though proper diligence is not employed to secure evidence for use at a trial the ends of justice may require the granting of a new trial to present new evidence in certain limited circumstances." *United States v. Philatelic Leasing, Ltd.*, 794 F.2d 781 (2nd Cir. 1986). The Honorable Judge Weinstein also applied the Ferrell Rule to ensure the just determination of an action in *Samuals et al., v. Health and Hospitals Corporation of the City of New York et al.*, 591 F.2d 195 (2nd Cir. 1979). The Southern District Court of New York has followed suit in recognizing the Ferrell Rule. Indeed, in *OPE Shipping Limited v. Underwriters at Lloyd's*, 100 F.R.D. 428 (S.D.N.Y. 1983), the court held that even if [the] defendants had not exercised due diligence, a new trial would be required in order to avoid an inequitable result. *Id.*

Even the Seventh Circuit, which fails to provide any exception to the due diligence requirement of 60(b)(2), recognizes this decisive split in the circuits. Judge Flaum, in his concurring opinion in *Central States, Southeast and Southwest Areas Pension Fund, et al. v. Central Cartage Company*, 69 F.3d 1312 (7th Cir. 1995), states that other circuits support "a general exception to the Rule 60(b)(2) due diligence requirement for the granting of relief from a judgment due to newly discovered evidence." Likewise, Seventh Circuit Judge Chudhay also observes in his dissenting opinion that "[o]ther courts have recognized the existence of the Ferrell Rule." *Gomez, et al. v. Chody, et al.*, 867 F.2d 395 (7th Cir. 1989).

Although it recognizes that there is a split in the circuits, the Seventh Circuit has apparently declined to adopt the Ferrell Rule. *United States v. McGaughey*, 977 F.2d 1067 (7th Cir. 1992); *Gomez, et al.*; *Watkins v. Miller*, 2000 U.S. Dist. LEXIS 7082 (S.D.Ind. 2000). Indeed, the court explicitly states that "there is no exception to Rule 60(b)(2) for conclusive evidence" and requires a showing of due diligence to vacate a judgment or an order. *Central States*; *Harris v. Owens-Corning Fiberglass Corporation*, 102 F.3d 1429 (7th Cir. 1996).

This inconsistency throughout the circuits illustrates why the guidance of the Supreme Court is needed. It is essential that this Court clarifies whether courts may provide an exception to the due diligence requirement of Rule 60(b)(2) because of the disparity in the administration of justice from one circuit to the next.

B. Another circuit would decide the present action differently.

It can be said with certainty that another circuit would decide the present action differently. If this action was brought before the Fifth Circuit, where the Ferrell Rule is applied, the order granting Oto's motion for summary judgment would have been vacated because the newly discovered evidence from Pagan is practically conclusive, since all Beverley had to do to withstand the motion for summary judgment was show that a genuine factual issue existed as to the authenticity of the signature. Clearly, drawing all inferences in Beverley's favor, the evidence offered by Pagan would be sufficient to show that a genuine factual issue existed and prevent the grant of summary judgment.

This case, like *Ferrell*, deals with newly discovered evidence that the circuit court judge determined was not discovered with due diligence. Pagan, akin to the copies of the money orders at issue in *Ferrell*, was discovered shortly after the district court granted the motion for summary judgment. However, the appellate court in *Ferrell* considered the newly discovered evidence and determined that such practically conclusive evidence required that the judgment be set aside in the interest of justice. Therefore, the affidavit from Pagan stating that the signature on the form is indeed that of Oto, is practically conclusive evidence pursuant to *Ferrell*, because it creates a genuine issue of material fact which would preclude the granting of summary judgment.

Simply because Beverley litigated this case before the Seventh Circuit instead of the Fifth Circuit, he was required to show that he exercised due diligence in discovering Pagan and no weight whatsoever was given to the fact that the newly

discovered evidence was practically conclusive. The Seventh Circuit refused to even consider or address Beverley's contention that despite the lack of due diligence in discovering Pagan that the order should be vacated because the evidence is practically conclusive. The grave disparity in the outcome of this action were it litigated in the Fifth Circuit is unacceptable and demands that this Court resolve this urgent matter.

II. The Decision of the Court of Appeals is Erroneous

Review by this Court is also necessary because the decision of the Seventh Circuit, like the district court before it, failed to consider substantial evidence in the record indicating that Beverley was diligent during the short period of discovery allowed, and despite that diligence, would never have been able to discover the existence of Pagan and his knowledge of Oto's signature. Also, both the district and appellate courts below ignored the evidence of the form itself, bearing Oto's signature, as evidence that Oto indeed signed the form. Finally, the district court ignored the evidence from Oto's prior deposition wherein he stated he did not have any assets, and the appellate court failed to consider this fact in a light most favorable to Beverley, which created a reasonable inference that Oto did sign the form.

A. Juan Pagan could not have been discovered with due diligence.

It is clear that the district court abused its discretion in denying Beverley's motion for reconsideration which included the testimony of Pagan that it was Oto's signature on the form. The Seventh Circuit has held that "the due diligence requirement of 60(b)(2) is circumscribed by a rule of reason."

United States v. Walus, 616 F.2d 283 (7th Cir. 1980). In this instance, reason indicates that Beverley did exercise due diligence in this case.

Beverley explained that the reason he could not have discovered and disclosed Pagan as a witness was because the two witnesses that would have any information regarding individuals familiar with Oto's signature, namely Oto himself and his daughter, were dead, and were not available to Beverley during discovery to provide any information. Likewise, neither Yoshio nor Beverley knew of individuals familiar with Oto's signature nor possessed any documents that belonged to Oto. This case represented a situation where neither the executor nor Beverley possessed significant, if any, knowledge regarding Oto. The executor, Yoshio, lived his entire life in California, while Oto lived in the Chicago area. Beverley had little or no contact with Oto, and his only tie to Oto was that he married his daughter shortly before her death in March of 1998. Neither party was in a position to discover Pagan and his knowledge of Oto's signature. It was only through sheer coincidence, as disclosed in the Beverley's attorney's affidavit, that Beverley learned of the existence and knowledge of Pagan.

The appellate court ruled that Beverley was not diligent because he could have asked Oto for names of former employees during Oto's deposition in the previous case, or he could have subpoenaed Oto's business records. (App. A, pages 11a and 12a). However, the appellate court misapprehended essential facts when reaching this conclusion. The appellate court's suggestion that subpoenaing Oto's business records would have led to the timely discovery of Pagan demonstrates that the Seventh Circuit misapprehended the capacity in which Pagan was employed by Oto. Pagan was not an employee of Oto's business which closed in 1993.

Pagan was employed by Oto from 1996 through April of 1997 doing various odd jobs at his home. Therefore, subpoenaing Oto's business records would not have lead to the discovery of Pagan. Likewise, neither Oto, Yoshio, nor Beverley possessed any of Oto's documents, so the subpoena suggested by the appellate court would have been futile. There are no documents in existence containing information regarding handymen doing odd jobs in or about Oto's residence. Lastly, Suzanne and Oto were both dead and neither of them could provide information regarding people doing odd jobs in and around Oto's residence.

Additionally, even if Beverley's attorney asked about former employees of the business during the deposition in the prior case, he still would not have learned about Pagan, since he was not an employee of Oto's electronics business. The appellate court also failed to apprehend that at the time the previous deposition was taken in July, 1998, the present case had not even been filed yet. Therefore, the appellate court's ruling presumes that Beverley's attorney should have predicted at the time of the deposition in the previous case, what issues would arise in this case, and that Oto would subsequently die and be unavailable to give testimony in the present case. Beverley's attorney had no idea at the time of the prior deposition what issues would arise in the future in this case. All of the facts in this case regarding Pagan simply were not available to Beverley prior to the district court's original ruling. Neither Oto, the district court, nor the Seventh Circuit has been able to provide a valid reason why Beverly's attorney should have discovered Pagan less than one month earlier.

Likewise, the appellate court misapprehends the time-frame in which the relevant events occurred. The appellate court states that this action began "in September, 1998 and

Beverly did not locate [Pagan] until nine months later more than two months after discovery closed." (App. A, page 11a). Although the appellate court is correct that the action between the Estate of Oto and Metropolitan Life Insurance began in September 1998, it fails to recognize that Beverley was not named as a Third-Party Defendant and did not enter his appearance until December 23, 1998. Therefore, it was less than five months after Beverley's appearance and less then one month after discovery closed that Pagan was discovered. Oto died before Beverley was made a party to this action making it impossible for Beverley to depose Oto in this action and ask him for information about individuals familiar with his signature.

If the Seventh Circuit had not mistaken the relevant times and the capacity of Pagan's employment, it would have found that Pagan could not have been discovered with due diligence. The assessment of the Seventh Circuit that due diligence was not demonstrated by the record in this case is not convincing, since a simple review of the record would convince any reasonable individual that Beverley was diligent in discovery and therefore, the district court should have at the very least held a hearing on the matter, or allowed the evidence to vacate the prior motion for summary judgment.

B. The form itself, bearing Oto's signature, presents a genuine issue of material fact to be considered by a jury.

Beverley sought to rely on the form itself, bearing the signature of Oto and witnessed by his daughter Suzanne as evidence supporting his position in response to the motion for summary judgment. Neither the District Court nor the Seventh Circuit ever addressed the issue of the form itself in any of their orders. (App. A, B, C, D, and E). The trier-of-

fact may make comparisons of handwriting samples to determine the genuineness of a signature without aid of testimony from an expert. *See United States v. Wylie*, 919 F.2d 969, 978 (5th Cir. 1990); *United States v. Woodson*, 526 F.2d 550, 551 (9th Cir. 1975). In addition, the Federal Rules of Evidence allow juries to compare the handwriting sample that is at issue with other samples to determine if the handwriting at issue is genuine. 17 U.S.C. §1731 (1976); Fed R. Evid. 901(b)(3). In this case, the district court and the appellate court ignored the evidence of the handwriting at issue, which was the signature of Oto on the form itself, and denied the jury the opportunity to compare the signature on the form with the other known signatures of Oto.

Beverley submitted evidence creating a genuine issue of material fact as to the authenticity of Oto's signature on the form, by way of the form itself, which is a part of the record and bears his signature. It is clear that the signature is that of Oto witnessed by Suzanne. This evidence in the record was ignored by the district court when it entered its order granting Oto's motion for summary judgment and when it denied Beverley's motion for reconsideration. Similarly, the Seventh Circuit also failed to recognize that the form itself was evidence that Oto signed the change of beneficiary form.

Both sides offered the form as evidence, and Beverley offered the deposition transcript of Oto's expert, which contained other signatures of Oto. The Seventh Circuit did not consider this evidence and thereby denied Beverley the opportunity to have the jury consider it, along with the known signatures, in determining whether or not Oto signed the form. Therefore, a question of fact remains to be decided by the jury, since when viewed overall, an inference can be made that the signature of Oto on the form appears to be basically the same as the other known signatures. Therefore, summary

judgment was not appropriate and the order must be reversed because of the existence of this evidence and the court acted outside its authority in determining the issue of genuineness of the signature. That was solely a question of fact for the jury.

C. Beverley did offer evidence by way of Oto's prior testimony that he had no assets which led to the inference that Oto did indeed sign the change of beneficiary form which was the central issue in this case.

In response to the motion for summary judgment, Beverley relied on evidence where Oto testified in the previous case that he did not have any assets and that he did not remember signing any papers with respect to his daughter's life insurance policy. Beverley argued that the whole life insurance policy with a cash value of over $20,000.00 was an asset, and that a reasonable inference could be drawn from Oto's testimony, was that he did sign the form transferring ownership of the policy to his daughter, and thereafter, did not possess any assets. The other inference argued by Beverley was if Oto could not remember whether he signed any papers with respect to the policy, that it could be argued that he did sign the form, or that he was lying or not certain when he said he did not sign the form. Beverley argued that when taken in the light most favorable to Beverley, these facts created a reasonable inference that Oto did sign the form.

The appellate court rejected Beverley's argument and ruled that Oto "probably did not have the financial sophistication to know that the policy was an asset nor did he likely have the business acumen to recall what papers he signed in connection with the life insurance policy." (App. A,

page 9a). However, the facts presented in the record, which were overlooked by the appellate court, strongly suggest that Oto knew the policy was an asset especially when the court, as it must, construes these facts in the light most favorable to Beverley. *Vakharia v. Swedish Covenant Hospital*, 190 F.3d 799, 805 (7th Cir. 1999), *Allen v. Transamerica Ins. Co.*, 115 F.3d 1305, 1309 (7th Cir. 1997).

The appellate court did not take into account the following facts, when seen in a light most favorable to Beverley, created the reasonable inference that Oto did have the financial sophistication to realize the policy was an asset. The appellate court overlooked the fact that Oto advised the Illinois Department of Public Aid on May 8, 1997, less than three months after the form was executed, that he did not own any life insurance policies. Additionally, the appellate court overlooked the fact that Oto's brother, Yoshio, an insurance agent, testified that in June of 1998, Oto had no assets other than his house. The appellate court also overlooked the fact that Oto owned and operated his own electronics business until 1993 and handled financial affairs, such as CD's and insurance, for Suzanne, and bought and sold stocks, held checking accounts, and had even converted his own life insurance policy into an annuity. Lastly, the appellate court overlooked the fact that Oto purchased the whole life policy and paid the $2,500.00 per year premiums on the policy until 1993, which was accumulating with interest. These facts all support the reasonable inference that Oto knew that the insurance policy, with a cash value of over $20,000, was an asset, and his subsequent statements that he had no assets were inconsistent with his position that he did not sign the form.

The only inference to be drawn from Oto's testimony that he had no assets and his representation to the Illinois

Department of Public Aid that he did not own any life insurance policies, is that Oto transferred the policy to Suzanne prior to claiming that he had no assets or insurance.

Beverley asserts that the inference is that Oto was aware that in order to receive public assistance, he would have to claim that he had no assets, so he transferred the life insurance policy to Suzanne, so the cash value would not be used to pay his nursing home bills, never thinking that a year later Suzanne would die from cancer. It was only after Suzanne died, leaving Beverley as the beneficiary, that Oto, who had previously denied owning any assets, denied signing the form seeking the proceeds for himself. All of these facts when taken in the light most favorable to Beverley create the inference that Oto did sign the form and subsequently denied signing the form because he wanted the money himself rather than have the money go to Beverley. This inference was also supported by Yoshio's statement that the only reason Oto objected to the policy going to Beverley was because he needed the money more.

When considered, especially in a light most favorable to Beverly, these facts overlooked by the appellate court create a reasonable inference that Oto knew the insurance policy was an asset, and that he signed the form (transferring the asset) prior to making the representations that he no longer had any assets. This evidence is consistent with Beverley's contention that Oto did sign the form, and creates a genuine issue of material–fact which should have precluded the granting of summary judgment in this matter.

CONCLUSION

The Seventh Circuit Court of Appeals' decision in this case is inconsistent with the decision that would have been handed down in the Second, Fifth, and Eleventh Circuits. Supreme Court guidance is necessary and critical to address this inconsistent treatment within the circuits with respect to the exception to the due diligent requirement of Rule 60(b)(2). The Petition for a Writ of Certiorari should be granted, otherwise, justice will not be uniformly administered within the circuits and Beverley will suffer a manifest miscarriage of justice.

/s/_____
(Admission Application Pending)
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Attorney for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed August 11, 2000]

No. 99-3112

YOSHIO OTO, Executor of the Estate of Noboru Oto,
Plaintiff-Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Defendant/Third-Party Plaintiff,

v.

ASHBY BEVERLEY,
Third-Party Defendant/Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 6666 - **Suzanne B. Conlon**, *Judge*.

Argued June 1, 2000--Decided August 11, 2000

Before BAUER, EASTERBROOK and MANION, *Circuit Judges*.

BAUER, *Circuit Judge*. Suzanne Oto's father and husband both claim the proceeds from her life insurance policy. The District Court ruled that the change of beneficiary form purporting to change the beneficiary from the father to the husband was a forgery and granted summary judgment for Noboru Oto, the father. Ashby Beverley, the husband, appeals. We affirm the District Court.

I. BACKGROUND

On November 1, 1989, Noboru Oto purchased a $250,000 life insurance policy on the life of his daughter, Suzanne M. Oto ("Suzanne"), from Metropolitan Life Insurance Company. Oto was a 79 year-old-widower. Suzanne was unmarried and worked as her father's bookkeeper. Oto was the policy's owner and primary beneficiary and paid all of the policy's premiums until Suzanne's death on March 22, 1998.

Unbeknownst to Oto, on February 19, 1997, a change of beneficiary form was executed. Although it bore his signature, Oto did not sign it.[1] The form, sent to MetLife, changed ownership of the policy from Oto to Suzanne. It also

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[1] Suzanne signed the form as a witness, but her untimely death makes it impossible for her to tell us who actually signed the change of beneficiary form.

changed the beneficiary from Oto to Ashby Beverley, Suzanne's then-boyfriend.

Suzanne and Beverley subsequently married. Although the record does not tell us when they were married, it was only five days before her death from breast cancer that Suzanne notified MetLife that she had married and her name was now Suzanne Beverley.

After Suzanne's death, both Oto and Beverley made claims to MetLife for the proceeds of the policy. Relying solely on the 1997 change of beneficiary form, MetLife refused payment to Oto. Oto sent MetLife an affidavit denying that he signed the change of beneficiary form and denying that he authorized any change in the ownership or beneficiary of the policy. However, MetLife still refused to pay him. He then brought this action against MetLife, seeking a declaration that the signature on the change of beneficiary form was a forgery and for the recovery of the proceeds of the policy. MetLife brought a third party action against Beverley and later deposited a check for the amount of the proceeds with the court, leaving Oto and Beverley to fight over the money.

At the same time that Oto was litigating this case he was also locked in conflict in state court with Beverley. The dispute was over the ownership of Oto's house. Beverley claimed that Oto signed a quit claim deed which gave the house to Suzanne and that the house passed to him upon

Suzanne's death. Oto denied ever having signed the deed and claimed that the signature was a forgery.[2]

During the pendency of the state court case, Oto gave a deposition and was questioned regarding the signature on the change of beneficiary form in this case. He denied signing it. He also denied authorizing any change in the ownership or the beneficiary of the policy.

Before his deposition could be taken in this case, Oto died and his brother was substituted as plaintiff.[3] Relying on the affidavit, the previous deposition testimony and the opinion of a handwriting expert, Oto moved for summary judgment. His motion was granted by the District Court. Beverley brought two motions for reconsideration, but both were denied. He appeals to us, claiming nine errors, ranging from errors committed by the District Court in considering some of Oto's evidence and errors in failing to consider some of his evidence, to claims that material issues of fact exist and that the District Court was simply wrong for entering judgment against him and in denying his motions for reconsideration. We must determine whether there exists any genuine issue of material fact and whether Oto is entitled to

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[2] Cook County Circuit Court Judge Lester Foreman held, in Case No. 98 CH 1770, that the signature purporting to be Noboru Oto's on the quit claim deed was indeed a forgery.

[3] Our references to "Oto" when discussing the facts continue to refer to Noboru Oto and not his brother and executor, Yoshio Oto.

judgment as a matter of law. We believe that there is not and that he is.

II. DISCUSSION

We review the District Court's grant of summary judgment under the familiar *de novo* standard, drawing all reasonable inferences in favor of the non-movant. *Vakharia v. Swedish Covenant Hospital*, 190 F.3d 799, 805 (7th Cir. 1999); *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 742 (7th Cir. 1999). In order to overcome summary judgment, Beverley must show specific facts sufficient to raise a genuine issue for trial. *See* Fed.R.Civ.Pro. 56(c); *Vakharia*, 170 F.3d at 805. "A genuine issue for trial exists only when a reasonable jury could find for the party opposing the motion based on the record as a whole." *Roger v. Yellow Freight System, Inc.*, 21 F.3d 146, 149 (7th Cir. 1994).

A. Evidentiary Issues

Oto relies on three pieces of evidence to establish that his signature was forged on the change of beneficiary form: an affidavit in which he states that he neither authorized a change in the beneficiary of the policy nor signed the form, a deposition in which he testifies he did not sign any documents transferring ownership of the policy to his daughter or beneficiary status to Beverley, and the opinion of a handwriting expert that the signature on the change of beneficiary form is a forgery. Beverley challenges each of these. Those evidentiary challenges require only a brief discussion.

Beverley argues that the District Court should not have considered Oto's affidavit in ruling upon the motion for summary judgment because the affidavit is inadmissible hearsay. Oto's affidavit stated in pertinent part:

> --I have since become aware that a Standard Change of Beneficiary Form was submitted to MetLife which attempts to change the ownership of the policy to Suzanne Oto and the beneficiary to Ashby Beverley. I have now been furnished with a copy of that document by MetLife which purportedly has my signature on it. A copy of that which I was furnished is attached to this affidavit as Exhibit "I."
>
> --I did not sign Exhibit "I."
>
> --I did not sign any Standard Change of Beneficiary Form.
>
> --I did not authorize any change of ownership, nor did I authorize a change of beneficiary of the policy in question.

Beverley claims that this affidavit is inadmissible hearsay because Oto ("the dead plaintiff") is unavailable to testify and because he "never had an opportunity to cross-examine him about the affidavit." This latter argument is clearly rebutted by the facts in the record. Oto was deposed in the state court action and Beverley's attorney questioned him about the signature on the change of beneficiary form:

Q. Okay. Mr. Oto, I am showing you what has been marked as Defendant's Exhibit No. 1. This is a Metropolitan Life standard change of beneficiary form. And I am going to ask you, is that your signature on that form dated 2/19/97?

A. No.

Q. Do you know whose signature that is?

A. No.

Q. Have you ever seen this document before?

A. No.

Q. Didn't you sign a document signing over ownership of your daughter's life insurance policy to her?

A. No.

As this colloquy makes clear, Beverley's attorney did have an opportunity, and in fact did, question Oto on the substance of his affidavit. His argument in that regard fails.

Beverley's other argument, that the affidavit should not have been considered by the District Court in ruling on the motion for summary judgment because Oto is now unavailable to testify, is actually a challenge to the affidavit's admissibility at trial. To mix the two would require us to read a "cross-examination" requirement into Rule 56 that is not

there. Certainly, the affidavit would not be admissible at trial unless he were able to cross-examine Oto as to its contents. A motion for summary judgment brought under Federal Rule of Civil Procedure 56, however, has no such requirement. Rule 56 merely provides for the submission of affidavits in support of or opposition to a motion for summary judgment. As long as the affidavit meets the requirements of subsection (e), it can be considered by the District Court in ruling on the motion, much the same that answers to interrogatories or depositions (which may contain inadmissible material) can be considered by the court. Since Oto's affidavit was "in the precise form" contemplated by Rule 56, was made under oath and based upon his personal knowledge, we hold that the District Court did not err in considering its contents in ruling on the motion for summary judgment.

As for Beverley's objection to the District Court's reliance on Oto's deposition testimony for the same reasons, we simply note that the deposition qualifies as former testimony of a now unavailable witness under Federal Rule of Evidence 804(b)(1). Beverley's other attack on the deposition, that it is unreliable because the copy of the transcript in the record includes as Exhibit 1 an application for insurance, rather than the disputed change of beneficiary form, is equally meritless. It is abundantly clear from the questioning during the deposition that there was no misunderstanding as to what document was being discussed. It was referred to by both name and date in counsel's question (see above). This error in the marking or attachment of this exhibit does not cause us to overturn the District Court's grant of summary judgment for we do not believe it confused anyone or caused the District Court to enter an improper judgment.

B. Genuine Issues Of Material Fact

Beverley's next series of arguments focus on evidence he believes create a genuine issue of material fact precluding summary judgment. He points to portions of Oto's deposition testimony in which Oto testified that he did not remember whether he "ever signed any papers for Metropolitan Life with respect to [his] daughter's life insurance policy" and that he did not have any "assets." It is not surprising that Oto, a survivor of the World War II relocation camps, did not know that the life insurance policy was an asset. He probably did not have the financial sophistication to know that the policy was an asset. Nor did he likely have the business acumen to recall what papers he signed in connection with the life insurance policy. Clearly, there would have been many papers to be signed in applying for the policy and we do not believe that he remembered what all of those papers were. Regardless of what papers were involved, we believe he would have remembered authorizing the change of the ownership and beneficiary of the policy. And that was the import of the question. Oto's testimony unequivocally established that he had done nothing to remove himself as owner or beneficiary of the policy. We do not believe that either of these facts championed by Beverley establish a genuine issue of material fact.

Beverley also attempts to overturn the judgment in favor of Oto by pointing to the deposition testimony of Oto's handwriting expert. Oto's expert examined twelve known signatures of Oto, including the signature on his affidavit and a signature taken from him during his deposition, and compared them to the signatures on the change of beneficiary form and the quit claim deed. She concluded that the

signatures on the disputed documents were not written by Oto. In short, she concluded they were forgeries. She prepared a written report to that effect and gave similar testimony during her deposition. However, the transcript that was prepared contained an answer that said the person who signed the 12 known signatures "is" the same person who signed the change of beneficiary form at issue in this case. The expert corrected her testimony on the errata sheet and added the word "not," putting her testimony back in line with her previously disclosed opinions. Beverley argues that this one misstatement or typographical error is enough to preclude summary judgment. We disagree and see it for what it is, either a misstatement or a typographical error. All of the expert's opinions had been consistent: the change of beneficiary form and quit claim deed were not signed by Oto. It would hardly make sense for her to maintain that opinion in all places except for one sentence in a multi-page deposition. As such, we agree with the District Court that the one statement by the handwriting expert was not enough to create a genuine issue of material fact.

C. Motion For Reconsideration

Beverley brought two motions for reconsideration. The District Court denied both. To prevail on a motion for reconsideration under Rule 59, the movant must present either newly discovered evidence or establish a manifest error of law or fact. *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995). A "manifest error" is not demonstrated by the disappointment of the losing party. It is the "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Sedrak v. Callahan*, 987 F.Supp. 1063, 1069 (N.D. Ill. 1997). Contrary to this

standard, Beverley's motions merely took umbrage with the court's ruling and rehashed old arguments. They did not demonstrate that there was a disregard, misapplication or failure to recognize controlling precedent. As such, they were properly rejected by the District Court.

Beverley, in addition to contending that the court was wrong to deny his motions, contends that the District Court abused its discretion in refusing to consider the "newly discovered" evidence presented in the form of an affidavit attached to one of the motions. This "newly discovered" evidence was an affidavit from an former Oto employee stating that he was familiar with Oto's signature, had reviewed the change of beneficiary form and believed that signature to be Oto's.

A party may not use a motion for reconsideration to introduce new evidence that could have been presented earlier. *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996). Beverley tells us that he discovered this witness only by "sheer coincidence." The District Court rejected this "new evidence," stating that Beverley made no showing why, through reasonable diligence, he could not have located this witness earlier.

We wonder the same thing. The lawsuit was filed in September, 1998 and Beverley did not locate this employee until nine months later, more than two months after discovery closed. He claims it is because Oto's death made it impossible to learn the identities of his employees. We do not believe that is a valid excuse as he could have asked Oto for the names of former employees during Oto's deposition or he could have subpoenaed Oto's business records. Given the ease with

which either of these things could have been done, it cannot be said that Beverley exercised due diligence. All of the arguments and facts in this case were or should have been available to Beverley prior to the District Court's original ruling. Therefore, the District Court did not abuse its discretion is refusing to receive new evidence at this late stage.

Beverley's motions for reconsideration did little more than rehash old arguments. Rule 59 is not a vehicle for rearguing previously rejected motions and, as that is what Beverley attempted to do, we affirm the District Court's denial of those motions.[4]

III. CONCLUSION

Oto's motion for summary judgment was properly granted because there existed no genuine issue of material fact that the signature on the change of beneficiary form was a forgery. All of the evidence submitted to the District Court bore this out. Beverley's contentions that the evidence relied upon by the District Court was inadmissible and that questions of fact exist are not supported by the record. For those reasons, we affirm the judgment of the District Court.

AFFIRMED.

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[4] Beverley also presents an argument that the District Court abused its discretion in striking his affidavit. We find that no abuse of discretion occurred.

A true Copy:

Teste:

/s/_____
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

[Filed August 9, 1999]

No. 98 C 6666

YOSHIO OTO, Executor of the Estate of Noboru Oto,
Plaintiff,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Defendant/Third-Party Plaintiff,

v.

ASHBY BEVERLEY,
Third-Party Defendant.

ORDER

Third-party defendant Ashby Beverly's second motion for reconsideration [76-1] is denied. [SEE REVERSE FOR DETAILS.]

Yoshio Oto, executor for the estate of Noboru Oto ("Oto"), sues Metropolitan Life Insurance Co. ("Met Life") to recover the proceeds of a life insurance policy insuring the life of Oto's daughter, Suzanne Oto ("Suzanne"). Met Life refused to pay Oto the proceeds because of a change of beneficiary form purporting to bear Oto's signature. Oto seeks to have the form signature declared a forgery and the proceeds paid to him as owner and beneficiary of the policy. In response, Met Life interpled Suzanne's boyfriend, Ashby Beverly ("Beverly"), as a potential beneficiary. On April 29, 1999, this court ordered Beverly to appear for his repeatedly postponed deposition by the close of business on that day; Beverly's affidavit in support of his summary judgment response would be stricken if he failed to do so. Beverly's attorney did not produce him for deposition on April 29, 1999. On May 11, 1999, summary judgment was entered in favor of Oto. On July 13, 1999, this court denied Beverly's motion for reconsideration of the May 11 judgment. Beverly moves for reconsideration of the July 13 order.

Motions for reconsideration serve a limited purpose. On reconsideration, a party may not introduce new evidence or legal theories that could have been presented earlier. *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996). Nevertheless, a motion to reconsider may be proper to correct manifest errors of law or to present newly discovered evidence. In the Matter of Prince, 85 F.3d 314, 324 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 608 (1996). Ultimately, a district court may grant a motion to reconsider so long as the court does not abuse its discretion. *Id.*

In Beverly's motion for reconsideration of the July 13 order (in effect, his second motion for reconsideration of the May 11 judgment), he contends this court ignored the "only inference to be drawn from his affidavit": namely, that he exercised due diligence in attempting to locate witnesses. Mot. to Reconsid. at 4. As stated in the July 13 order, Beverly's bald assertions that he conducted discovery with reasonable diligence are refuted by the record. *See* Order of July 13, 1999. Beverly's February 24 motion to extend discovery shows no attempts to find people familiar with Oto's signature. In that motion, Beverly anticipated only the need to locate a handwriting expert. Mot. to Extend at 3. He did not mention a need or any attempt on his part to locate a lay witness familiar with Oto's signature. Moreover, this court denied Beverly's motion to extend discovery for failure to show good cause for waiting three months to initiate any discovery. *See* Order of March 4, 1999. Only after Beverly filed an unopposed motion to reconsider the March 4 order did the court extend discovery by one month. *See* Order of March 18, 1999. The record demonstrates Beverly was not diligent in conducting discovery.

Beverly's [second] motion for reconsideration presents no new evidence; it merely rehashes arguments made in the first motion for reconsideration and suggests that the court "equitably" excuse his lack of deligence without a basis in fact.

/s/_____

APPENDIX C

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

[Filed July 13, 1999]

No. 98 C 6666

YOSHIO OTO, Executor of the Estate of Noboru Oto,
Plaintiff,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Defendant/Third-Party Plaintiff,

v.

ASHBY BEVERLEY,
Third-Party Defendant.

The motions of third-party defendant Ashby Beverly for reconsideration of the April 29, 1999 and May 11, 1999 orders [65-1, 70-1] are denied. [SEE REVERSE FOR DETAILS.]

ORDER

Yoshio Oto, executor for the estate of Noboru Oto ("Oto"), sues Metropolitan Life Insurance Co. ("Met Life") to recover the proceeds of a life insurance policy insuring the life of Oto's daughter, Suzanne Oto ("Suzanne"). Met Life refused to pay Oto the proceeds because of a change of beneficiary form purporting to bear Oto's signature. Oto seeks to have the form signature declared a forgery and the proceeds paid to him as owner and beneficiary of the policy. In response, Met Life interpled Suzanne's boyfriend, Ashby Beverly ("Beverly"), as a potential beneficiary. On April 29, 1999, this court ordered Beverly to appear for his previously scheduled deposition by the close of business on that day; Beverly's affidavit in support of his summary judgment response would be stricken if he failed to do so. Beverly's attorney did not produce him for deposition on April 29, 1999. On May 11, 1999, this court entered summary judgment in favor of Oto. Beverly moves for reconsideration of both the April 29th order and the May 11th judgment.

Motions for reconsideration serve a limited purpose. On reconsideration, a party may not introduce new evidence or legal theories that could have been presented earlier. *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996). Nevertheless, a motion to reconsider may be proper to correct manifest errors of law or to present newly discovered evidence. *In the Matter of Prince*, 85 F.3d 314, 324 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 608 (1996). Ultimately, a district court may grant a motion to reconsider so long as the court does not abuse its discretion. *Id.*

Oto first argues that Beverly's motions are untimely. Beverly's motion for reconsideration of the April 29th order is timely if he can show relief is warranted under Fed. R. Civ. P. 60(a) or (b), which leave the time limitations up to the court's discretion. However, Beverly has not shown the April 29th order resulted from a mistake, fraud, or newly discovered evidence. At the April 29th hearing on Oto's emergency motion to compel Beverly's deposition, attorneys for both sides informed the court of the difficulties in scheduling Beverly's deposition, which had been repeatedly postponed. *See* Mot. for Reconsid. of April 29th Order, Exs. B, D, F, I, K, L. The court's order that Beverly appear for deposition on April 29th as originally scheduled was reasonable considering that Oto's summary judgment reply brief was due on May 2, 1999. Moreover, the court had already extended the discovery period once for Beverly's benefit, even though Beverly had waited three months before initiating any discovery. *See* Order of March 4, 1999, and March 18, 1999. Finally, Beverly's summary judgment affidavit stricken partially in reliance on that order also failed to comport with Fed. R. Civ. P. 56(e)[1] *See* Order of May 11, 1999. Even if the court vacated the April 29th order, it could not consider Beverly's hearsay affidavit. Accordingly, Beverly's motion for reconsideration of the April 29th order is denied.

A motion to alter or amend judgment must be filed within ten days after entry of the judgment. Fed. R. Civ. P. 59(e). Judgment was entered on May 20, 1999; Beverly filed

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[1] Beverly admits in the reply for his reconsideration motion that his summary judgment affidavit was not based on personal knowledge. *See* Reply ¶ 4.

his motion for reconsideration of that judgment on June 1, 1999. When the time allowed for filing a motion is less that 11 days, intermediate Saturdays, Sundays and legal holidays are excluded from computation. Fed. R. Civ. P. 6 (a). Therefore, Beverly's June 1st motion is timely. Beverly argues this court made a manifest error of law by relying on portions of handwriting expert Ellen Mulcrone Schuetzner's deposition. This court found Schuetzner's deposition persuasive in its entirety, and Beverly's failure to submit evidence contradicting Schuetzner's analysis left no genuine issue of material fact as to the forgery of Oto's signature.

Beverly next contends he has new evidence in the form of Juan Pagan, Oto's employee from 1996 to 1997, who can testify to the authenticity of Oto's signature on the change of beneficiary form. However, Beverly fails to sufficiently explain why, with reasonable diligence, he could not have discovered and disclosed Pagan as a witness. Beverly's attorney asserts he learned of Pagan's existence "coincidentally in relation to a discussion with him regarding an entirely different matter." Mot. For Reconsid. of May 11th Order, Ex. 4, ¶ 4. Beverly does not establish that he made any effort during discovery to locate former employees or others purportedly familiar with Oto's signature. Accordingly, Beverly's motion for reconsideration of the May 11th judgment is denied.

/s/_____

APPENDIX D

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

[Filed May 11, 1999]

No. 98 C 6666

YOSHIO OTO, Executor of the Estate of Noboru Oto, *Plaintiff,*	)
v.	)
METROPOLITAN LIFE INSURANCE COMPANY, *Defendant/Third-Party Plaintiff,*	)
v.	)
ASHBY BEVERLEY, *Third-Party Defendant.*	)

Plaintiff's motion for summary judgment [31-1] is granted. Judgment is entered in favor or plaintiff Yoshio Oto, executor of the estate of Noboru Oto, and against third-party defendant Ashby Beverly. Beverly's cross motion for summary judgment [39-1] is denied. Plaintiff's motions to strike [46-1, 47-1, 48-1] are moot. [SEE REVERSE FOR DETAILS.]

ORDER

Yoshio Oto, executor for the estate of Noboru Oto ("Oto"), sues Metropolitan Life Insurance Co. ("Met Life") to recover the proceeds of a life insurance policy insuring the life of Oto's daughter, Suzanne Oto ("Suzanne"). Met Life refused to pay Oto the proceeds because of a change of beneficiary form purporting to bear Oto's signature. Oto seeks to have the signature on the change of beneficiary form declared a forgery and the proceeds paid to him as owner and beneficiary of the policy. In response, Met Life interpled Suzanne's boyfriend, Ashby Beverly ("Beverly"), as a potential beneficiary. Oto moves for summary judgment pursuant to Fed. R. Civ. P. 56. Without leave of court, Beverly has filed an untimely cross motion for summary judgment.

All facts are undisputed unless otherwise noted. On November 1, 1989, Oto purchased from Met Life a flexible premium life insurance policy, which insured the life of his daughter, Suzanne, and had a face value of $250,000. Def. 12M ¶¶ 7, 9. Oto was the owner and beneficiary of the policy. *Id.* ¶ 8. When Suzanne died on March 22, 1998, all premiums due and owing under the terms of the policy had been paid. *Id.* ¶¶ 10, 11. Upon filing a timely claim for the proceeds, Oto was informed by Met Life that he was no longer the beneficiary of the policy. *Id.* ¶¶ 12, 13. Met Life informed Oto that a change of beneficiary form, purportedly signed by Oto and dated February 19, 1997, made Suzanne the policy owner and Beverly the beneficiary. *Id.* ¶ 14. Oto sent Met Life an affidavit denying both the transfer of ownership and the change of beneficiary. *Id.* ¶ 15. On September 15, 1998, Oto filed suit for breach of contract and

declaratory judgment against Met Life to recover the policy proceeds.

A movant is entitled to summary judgment under Rule 56 when the moving papers and affidavits show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 314, 322 (1986); *Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1209 (7th Cir. 1993). Once a moving party has met its burden, the non-moving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Becker v. Tenebaum-Hill Assoc., Inc.*, 914 F.2d 107, 110 (7th Cir. 1990). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *Fisher v. Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1242 (7th Cir. 1992). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248(1986); *Stewart v. McGinnis*, 5 F.3d 1031, 1033 (7th Cir. 1993).

Oto relies on three pieces of evidence to establish his signature was forged on the change of ownership and beneficiary form ("the form"): an affidavit in which he avers he neither authorized a change of beneficiary nor signed the form; a deposition in which he testifies he did not sign any documents transferring policy ownership to his daughter or beneficiary status to Beverly; and an expert handwriting analysis concluding the form signature is a forgery. Beverly attacks Oto's affidavit on the ground that it constitutes inadmissible hearsay. However, Oto's affidavit is in the

precise form contemplated as summary judgment support by Fed. R. Civ. P. 56(e), which reads in pertinent part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. In his affidavit, Oto makes an oath of personal knowledge. By contrast, Beverly's affidavit in opposition to Oto is not based on personal knowledge; Beverly would not be permitted to testify at trail on the matters contained in his affidavit. Moreover, Beverly's affidavit is stricken from the record pursuant to this court's order of April 29, 1999.

Beverly argues Oto's deposition comprises inadmissible hearsay because it was taken during the course of another lawsuit. Oto's deposition testimony meets evidentiary requirements and is properly offered in support of his summary judgment motion. "Testimony given as a witness . . . in a deposition taken in compliance with law in the course of the same or another proceeding (is not excludable hearsay) if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804 (b)(1). Beverly's counsel questioned Oto extensively about the insurance policy and forms during the deposition in question. Pl. Ex. 5 at 16-19, 48-51. Because Oto is now an unavailable witness, his prior testimony is admissible evidence in support of his motion. Fed. R. Evid. 804 (a)(4).

Finally, Beverly assails the handwriting conclusions of Oto's expert, Ellen Mulcrone Schuetzner ("Schuetzner"). Schuetzner reviewed twelve exemplars of Oto's known

signature, including Oto's notarized affidavit entered in the record. Pl. Ex. 6 at 1-2. Schuetzner compared the twelve exemplars to the signature on the change of beneficiary form. She concluded the signature on the form was not Oto's, but rather was an attempted simulation of Oto's signature. *Id.* at 2. Oto has produced evidence establishing the form signature as a forgery. Beverly has not submitted evidence creating a genuine issue of material fact as to the authenticity of the form signature. Judgment as a mater of law is appropriate. *United States v. Torres*, 142 F.3d 962, 968 (7th Cir. 1998). Accordingly, judgment is entered in Oto's favor.

/s/_____

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

[Filed September 21, 2000]

No. 99-3112

YOSHIO OTO, Executor of the Estate of Noboru Oto, *Plaintiff-Appellee,*	)
v.	)
METROPOLITAN LIFE INSURANCE COMPANY, *Defendant/Third-Party Plaintiff,*	)
v.	)
ASHBY BEVERLEY, *Third/Party Defendant/Appellant.*	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Suzanne B. Conlon, *Judge*.

ORDER

On consideration of the petition for rehearing filed in the above-captioned case by appellant, all of the judges on the original panel have voted to deny. Therefore, the petition for rehearing is hereby DENIED.